92-1918

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES HAMILTON, ET AL,
Petitioners,
v.
THE GROCERS SUPPLY COMPANY,
Respondents.

Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fifth
Circuit

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is it unlawful age discrimination under the Age Discrimination in Employment Act (ADEA) to eliminate from an employer's work force a generally older group of employees, 63% of whom are over 40 years of age, so as to replace them with generally younger workers who will work for less.

2. Do those in the group who are under the age of 40, and who suffer the same fate, have standing under the ADEA.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners are comprised of 192 individuals each of whom is a party plaintiff. The Petitioners are listed below. Grocers Supply Company, Inc. was the Defendant-Appellee in the court of appeals.

In the appellate court below, this case was consolidated for purposes of appeal with *Britt, et al vs. the Grocers Supply Company, Inc.* The Plaintiffs-Appellants in that case have filed a separate Petition for Writ of Certiorari with this court (Case No. 92-1577) on grounds that differ from those presented herein.

James E. Hamilton
Eli Abrams
A.B. Allen
Jack Allen
Marion Amos
Ruben Aguilar
Ray Baker
Wilbert W. Baker
Javier Barba
Johnny L. Battles
Clyde D. Beard
Edward Bennett
Louis F. Bias, deceased
Jonathan T. Blacknall
Gene Bland
Roosevelt V. Bolds
Jim Bowden
Robert Lee Branch
Julius A. Britto
Eddie Brooks
Mack D. Brown
Terry Brown
Eddie M. Brown
Melvin Burton
Roy Butler
James Z. Calloway
Ernesto P. Cardenas
Joseph M. Castille
Nathaniel Cephas
David Cevantes
Able Chacon
Melvin Charles
Tracy Chinn
Derek Chopp
Edgar Cisneros
James Clay
Berry Conley
Howard Conely
Sammie Cooks
Donald Ray Craft

Adell Cross
Joseph Daigle
Paul Darjean
Vernon Davis
David DeCoux
Herbert E. Demby
L.K. Dennis
Charles F. Dirden
Albert Duarte
Bobby L. Ellison
Alberto Espinoza
Adam Ettienne
Reginald Evans
Frank E. Fanniel
Berley C. Fields
Woodrow Fisher
Garfield Flores
Henry Ford
Alvin Francis
Francisco Garcia
Freddie Garriett
Henry George
James Gipson
Robert R. Grace
Dorris M. Graham
Joseph Grant
Gus Charles Green
Floyd D. Green
Clarence Green
Clyde J. Guillory
Perry Hall
Curtis Hall
Eugene Hall
Louis Hall
Abraham Hamilton
Robert Harris
Michael A. Hatton
Jesse James Hemphill
Whaley L. Henry
Albert C. Hines
McCoy Holcomb
Linard Holden
William M. Holiday
Adrian Huerta
Geronimo Huerta
Arthur Jackson
Alvoird K. Jackson
Gilbert Jackson
Willie Jackson
Joseph James
Alvin Johnson
James W. Johnson
Willie Johnson
Larry Johnson
Kennie R. Johnson
Will J. Johnson
Robert Lee Jones
Archie W. Jones
Lewis Curtis Jones
Herbert Jones
Fred Kennedy
B.J. King
Wilfred Kinnerson
Ervis LeFleur
Bobby Lambert
John W. Landry
Leon J. Leday
Ryan Levy
Juan Lopez
James Loza
Herbert Lynch
Ernest Maes

Roy Marquez
Lee Martin
Arthur Martinez
Oscar Matthews
Early McCalister
Charles McCoy
Evert McCoy
Stacy McGregor
Harry Means
J.L. Menifee
Robert Mack Mills
Otis Moore
Willie Moore
Rufus H. Moshay
Armando Moya
Felix W. Nelson
Herbert Norman
Emanuel Olford
Rudolph Owens
Oliver Palmer
Hector Pena
Artis Preston
George Price
Sam Price
Robbie Gene Price
Ray Floyd Pryor
Jeffrie Randall
Henry S. Remaker
Roy Richardson
Maurice Robertson
Ivery E. Robins
Billy Joe Robinson
Homer Robinson
James Rogers
Will A. Rogers
Santos Rojas
Salvador Ruiz
James E. Russell
Ron Saenz
Antonio Salazar
Elmer D. Sanders
James Sawyer
Milton Earl Scott
Roy Sharp
James T. Seals
Wilbert Shepherd
Billy R. Simmons
Marshall Simpson
Jimmie Smith
Augustus Smith
Michael Sneed
Daniel Soliz
R.C. Stanley
Oscar Steward
Overton Stewart
Don L. Sweat
Johnnie Therance
Roosevelt Thomas
Shirley Thomas
Morris Thompson
Cleve Vercher
Herman Walker
Barney E. Walsh
Billy Washington
Joseph Wesley
Jerry White
Willie Ray White
Willie L. White
Waddell Wiggins
Robert Wilkerson
Razz Williams
James E. Williams

Dan R. Williams
Lee Otis Williams
James W. Wilmore
Annie Jackson, administrator
for T.J. Jackson, deceased

Irma Gene Scott, administrator
for Jeff Scott, deceased

Shirley Ann Hayes, administrator for Walter Hayes, deceased

Daisy Simpson, administrator
for Willie Simpson, Deceased

A.B. Allen, administrator for
Johnny Allen, Deceased

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Petition For Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

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Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 15, 1992, and amended in its rehearing opinion dated March 1, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit Court of Appeals is reported at 978 F.2d 1441 (5th Cir. 1992). The court's decision on petition for rehearing is reported at 986 F.2d 97 (5th Cir. 1993). The

decision of the District Court for the Southern District of Texas, Houston Division, (App.A, 1a infra) that court's Findings of facts and Conclusions of Law (App.B, 6a infra) final judgment is not reported.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on December 15, 1992. A decision on rehearing was entered on March 1, 1993. This court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. §623(a):

"It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this act."

Age Discrimination in Employment Act 29 U.S.C. §626(c):

"(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall

terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act."

29 C.F.R. § 7(f) is quoted below at page 8.

STATEMENT OF THE CASE

A. Factual Background.

Grocers Supply Company, Inc. ("Grocers") is a Texas corporation engaged in the wholesale food distribution business. In December, 1986, Plaintiff's were members of it's non-administrative work force at the company's main warehouse on Holcombe street in Houston, Texas. They were generally referred to as the "Holcombe" work force to differentiate them from the work force at other companies owned by Grocers Supply. This work force numbered approximately 590 warehousemen and truck drivers working in shifts on a 24-hour basis.

The Holcombe work force was, as a group, mature in age and seniority averaging 43.3 years of age and 14.3 years of job seniority. Sixty-three percent of the work force was over the age of forty. The group of Petitioners in this case are comparable in age to that of the work force as a whole.

The Holcombe work force had been represented by The Teamsters, General Drivers, Warehousemen and Helpers, Local Union No. 968 since the early 1950's. The long history of contract negotiations between the company and the union had resulted in wages that were "substantially higher" for Holcombe employees as compared to other companies owned by Grocers Supply. In December, 1986, Holcombe employees earned an average wage of $ 12.45, an

amount $3 to $5 an hour more than groups at other companies owned by Grocers. Holcombe employees were in a pension plan, whereas the employees of other parts of the company were not. These additional benefits added 25% to the cost of employing the Holcombe employees.

The fact that this work force was maturing in age was well known by the owners of the company. They had discussed the problem of the higher age of the Holcombe work force, and their concerns of the productivity of these older workers, with the union business manager.

In 1984, a grocery distribution expert hired to advise the owners of the company in the "modernization" of their operations began to repeatedly tell Holcombe employees that they were "too old" and making "too much money." These comments continued into 1986, at which time he stated that the higher age and higher wages of the Holcombe work force was the company's "biggest problem."

On December 21, 1986, the Holcombe work force went on strike. The primary reason for the strike concerned the company's proposal of a new piece rate wage program. Commencing in January and continuing through March, 1987, the company permanently replaced all of the striking workers. Those offering themselves back to work thereafter were told there were no jobs. At the same time, however, the company continued to hire new, younger employees "off the street." The replacement workers hired to replace the strikers were an average age of 31.5. The strike ended on April 3, 1987. Thereafter the company did not return the strikers to work as job opening came about, choosing instead to employ labor pool personnel throughout 1987 to perform bargaining position work. During this period, the vast majority of strikers resigned under economic duress to obtain

their pensions funds. Those resigning were treated by the company as ineligible for later recall.

In February, 1988, after the commencement of this suit, the company began to hire regular employees. At that time only a handful of striking employees had not resigned to obtain their benefits. Those that were left were offered only the most undesirable jobs working in the company's frozen food warehouse, while those hired off the street were hired into the more desirable jobs.

B. The Lawsuit.

On July 21, 1987, Petitioners filed this action in the United States District Court for the Southern District of Texas, Houston Division, against Grocers Supply Company, Inc. They asserted that Grocers set forth to discriminate against the striking work force as a group because of its generally higher age, and the higher wages earned by that group which had been gained over the 15 year average seniority of the group. They asserted that by not bargaining with them in good faith during the strike, by refusing to take them back into available jobs in the work force, by using labor pool personnel after the strike, and by treating them as ineligible to be recalled once they opted, under economic duress, to cash out of their pension funds, the company engaged in a scheme specifically to enable it to eliminate its older, pre-strike work force. The decision to permanently replace this work force during the strike, and the measures it took to keep these workers away, allowed Grocers to reduce the age of its work force by 12 years, to reduce the wages of each worker by $3 to $5 per hour, and to eliminate the payment of any benefits to its employees.

The petitioners acknowledge that it is within the rights of the company to seek to reduce the wages paid to their

employees. Petitioners assert that it was the manner in which such reduction was achieved in this case that made it unlawful under the ADEA.

C. Motion for Directed Verdict

Trial of the age discrimination case commenced on August 19, 1991. On August 26, 1991, at the close of the Plaintiffs' case, the District Court granted Grocer's motion for directed verdict on the remaining age discrimination cause of action. The basis of the directed verdict was that the plaintiffs did not establish a prima facie case. Although the district court clearly felt that Grocers was seeking to eliminate the striking employees as a group,[1] it held that the plaintiffs' case must fail because the striking workers were all treated the same, albeit poorly. It held that the prima facie burden on the plaintiffs was to establish that (1) the company refused to consider recall applications of protected employees over forty years of age; (2) applications for recall were accepted from workers under forty years of age; and (3) the protected workers were qualified for the jobs. Final judgment was entered on September 5, 1991.

D. Decision of the Fifth Circuit.

On appeal, the Fifth Circuit affirmed the decision of the district court, holding that the plaintiffs did not show a prima facie case. While acknowledging the plaintiffs' theory that it was unlawful discrimination under the ADEA to

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[1] In ruling on the directed verdict motion from the bench, the court stated: "Well, my point is if the company for whatever reason did not want any of these strikers back and it's obvious they didn't want any of the strikers back ..... You're shown them that they didn't want them back because they were making more money... They just wanted to be shut (sic.) of this particular work group, and they got shut of them. (App,2a-3a, infra)

eliminate older employees as a group based on their higher salaries so as to replace them with generally younger workers who would work for less, the court specifically rejected this theory.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURT'S RULING CONFLICTS WITH DECISIONS OF OTHER CIRCUITS WHICH HOLD THAT, UNDER APPROPRIATE CIRCUMSTANCES, DISCRIMINATION AGAINST OLDER EMPLOYEES BECAUSE OF THEIR HIGHER WAGES CAN BE A PROXY FOR AGE DISCRIMINATION.

This case present the court with an opportunity to resolve important issues involving age discrimination in employment: 1) whether it is lawful to eliminate older workers as a group because of their higher salaries so as to replace them with generally younger workers, who will work for less; and, 2) whether workers under the age of forty have standing under the ADEA to sue for age discrimination under appropriate circumstances.

Several circuits have accepted that it is unlawful under the ADEA to eliminate older employees *as a group* based on their higher salaries or benefits so as to replace them with generally younger workers with little or no seniority, who would work for less. See *Metz v. Transit Mix*, 828 F.2d 1202, 1206 (7th Cir. 1987); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691 (8th Cir.1983); *EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir.

1984); *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981); *Donnelly v. Exxon Research & Eng'g Co.*, 12 F.E.P. 417 (D.N.J. 1974), aff'd mem., 521 F.2d 1398 (3rd Cir. 1975), *Mastie v. Great Lakes Steel Corp.*, 424 F.Supp. 1299 (E.D.Mich. 1976). See generally 1 H. J. Eglit, Age Discrimination, Section 16.32 (1985).

The Equal Employment Opportunity Commission has adopted a guideline concerning discrimination and the cost of employing older employees as a group:

> "A differentiation based on the average cost of employing older employees *as a group* is unlawful except with respect to employee benefit plans which qualify for the section (f)(2) exception to the Act." *29 C.F.R. Section 7 (f)* (1986) (emphasis added)

In its decision below, the Fifth Circuit specifically rejects this line of reasoning as its pertains to age discrimination, placing it squarely in conflict with the decisions of other circuits on this issue. For that reason, the Petitioners urge this Court that certiorari should be granted.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT, AND THE DECISIONS OF OTHER CIRCUITS, WHICH HOLD THAT UNDER

APPROPRIATE CIRCUMSTANCES, WORKERS UNDER THE AGE OF 40 HAVE STANDING UNDER THE ADEA.

Standing under the ADEA is conferred by 29 U.S.C. §626 (c)(1). It states:

> *Any person aggrieved* may bring a civil action in any court of competent jurisdiction for such legal or equitable relief *as will effectuate the purposes of this chapter....* (emphasis added)

The *any person aggrieved* language of Section 626 has been given a broad interpretation, i.e. it has been interpreted as evincing Congress' intent to extend standing to individuals as broadly as is compatible with the constitutional requisites established by Article III of the United States Constitution. Title VII of the Civil Rights Act of 1964 contains virtually identical language. 42 U.S.C. §2000e-5(b), (f)(1). That language has been interpreted liberally so as to allow individuals to maintain suit even though they are not members of the protected class, so long as they are harmed by virtue of wrongs done to persons in the protected class. See *Stewart v. Hannon*, 675 F.2d 846 (7th Cir 1982); *Waters v. Heublein, Inc*, 547 F.2d 466 (9th Cir. 1976), *cert denied*, 433 U. S. 915 (1977) (white female could maintain suit based on discrimination against blacks and Hispanics). Title VII case law is looked to by ADEA courts for guidance. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1978) and *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir 1979). These cases are, therefore, relevant in supporting a broad reading of the "any person aggrieved" language of 29 U.S.C. §626(c)(1), to allow an under-40 individual to sue

where injury inflicted on an ADEA-protected individual also harms the younger person.

In upholding the trial court, the Fifth Circuit adopted the trial court's prima facie requirement for the Plaintiffs. The court reasoned that if older strikers were treated the same as younger strikers there could be no disparate treatment. The first two elements of the prima facie case adopted by the Fifth Circuit condition the viability of the ADEA cause of action for each Plaintiff upon the showing of age over forty. In adopting this standard, it is implicit that the Fifth Circuit rejected the concept of age discrimination as against the group, and rejected the standing of those in the group under forty years of age.

The petitioners assert that a proper disparate treatment analysis in any ADEA cases must involve a comparison of those claiming to have suffered an adverse employment decision (here the older group who were earning higher wages, 63% of whom were over the age of 40), with those who benefited from such decision (here the younger group of replacements and new hires, 85% of whom were under the age of 40 and who were paid substantially less). Instead, the court below compared one group of workers claiming an adverse employment decision (the striking workers over 40 years of age) with others in the same group claiming the same adverse employment decision, who are differentiated only by the fact that they were under the age of 40. By simply treating under 40 workers as not having standing under the ADEA the court ignored the assertions of the petitioners that they were discriminated against as a group.

The standing under the ADEA of those under forty years of age is an issue that has not been specifically decided by this court. Although this court has affirmed a remedy under the ADEA for an employee under the age of 40, see

Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353 (1985), various circuit court decisions still refuse to allow standing to a person under forty under any circumstance. *Spain v. Ball*, 928 f.2d 61 (2nd Cir. 1991) and *Thomas v. United States Postal Inspection Service*, 647 F.2d 1035, 1036 (10th Cir. 1981). Circuit court decisions routinely state in ADEA cases that in order to establish a prima facie case a plaintiff must first establish that he or she is in the protected class, i.e. a person over 40 years of age. These cases, however, invariably do not concern a direct ruling on the issue of standing.

In *Johnson, supra*, this court reversed a decision of the Fourth Circuit, holding that it's denial of relief to all plaintiffs in a multi-plaintiff case was in error. The decision reinstated relief granted at the trial level to a group of plaintiffs, one of whom was only 32 years old. At the Circuit level, the dissenting judge read the majority opinion as holding that the 32 year old plaintiff had standing to sue, and he further noted that he agreed with that part of the majority's ruling, 731 F.2d at 216 n.1 (Winter, CJ, dissenting).

A case with the identical issue as that facing the under 40 Hamilton petitioners is *Allen v. American Home Products*, 644 F. Supp. 1553 (ND Ind 1986). There, confronted with a claim of age discrimination against plaintiffs over *and* under 40 years of age resulting from a plant closure, the court ruled that those under 40 did have standing under the ADEA.

This case allows this Court to address the confusion which has arisen relating to the difference between that which is prohibited under the ADEA (discrimination against those over 40 years of age), and the rights of those who have

a remedy for such discrimination ("any person aggrieved"). The petitioners assert that certiorari would be appropriate in this case.

CONCLUSION AND PRAYER

WHEREFORE, for the foregoing reasons, the Petitioners respectfully pray that this Honorable Court grant their Petition for Writ of Certiorari and proceed to the merits of this issues presented.

Respectfully submitted,

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APPENDIX A

THE COURT: All right. I'm going to grant the Defendant's Motion for Directed Verdict. Perhaps in my previous granting in portion the portions of the directed verdict, obviously I misuse the word terminate. I did not mean to use -- or discharge or whatever it was. I was using that and the fact that they were -- had left their jobs and ceased employment; not necessarily apparently I found out later that in labor law, apparently this has something entirely different discharge. I meant it in the terms of -- of leaving employment and cease getting paid while your period is out there. But nevertheless, regardless of what you call it, and I think and the reason that I permitted this to go on for the -- to see if you could make a prima facie case, that discharge isn't the key word. The key word is the -- any act of discrimination, and I felt that if you could show that somehow they discriminated in bringing these strikers back on the basis of age, that you could make a case. And I don't think you've shown that.

MR. PHILLIPS: What about the --

THE COURT: I don't think that it's -- I think you have to show it among -- among the strikers that they -- that they treated the strikers different. The older workers, they treated worse than the younger strikers, and I don't think you've shown that.

MR. PHILLIPS: Your Honor, if you have a twenty six year old applicant here from the street and you have a recall forty three year old person here and you say, okay, you get a -- even though you were a selector, you get -- I'm offering you a casual -- you were a selector in the main

warehouse. I'm offering you the frozen food casual job, and you over here, I'm offering you the selector job; that's discrimination.

THE COURT: Well, my point is if the company for whatever reason did not want any of these strikers back and it's obvious they didn't want any of the strikers back --

MR. PHILLIPS: That -- That answers the question right there, Your Honor.

THE COURT: That if they treat them all just like that -- what they used to say about -- Vince Lombardi; he treated us all alike. He treated us all like dogs. If you treat them all alike, you haven't been discriminated on the basis of age discrimination.

MR. PHILLIPS: Your Honor, we don't have to compare them to anyone. That is not the requirement.

THE COURT: Well, I think you do. I think you --

MR. PHILLIPS: You don't have to compare them. You only have to show that the motivation was age. Anything else is -- is not necessary. If you can show the motivation is age, it's not necessary. You say yourself, it's pretty clear that they didn't want them back. Why? Why didn't they want them back? If the -- If the answer to that question is age, then this Jury should be able to --

THE COURT: And I think that you haven't shown that. That's the problem. You've shown them that they didn't want them back because they were making more money. That money's not tied to age. You've shown that

they didn't want them back because they had previously struck and they had -- they had made several threats to strike over a period of years. They just wanted to be shut (sic.) of this particular work group, and they got shut of them.

MR. PHILLIPS: But --

THE COURT: But I don't think it's on the basis of age, and you haven't shown that. So I'm going to grant the Defendant's Motion for Directed Verdict. I will get -- I will have to do Findings of Fact. Do you wish to do proposed Findings of Fact and Conclusions of Law?

MR. SMITH: Yes, Your Honor; be glad to.

THE COURT: All right. And if you have any that you wish incorporated for appeal purposes, how soon can you get those done?

MR. SMITH: Your Honor, we can get them in by tomorrow morning.

THE COURT: How much time would you like, Mr. Phillips?

MR. PHILLIPS: I would like a little more time than that, if I may.

THE COURT: Well, till the end of the week?

MR. PHILLIPS: Till the end of the week, if we could.

THE COURT: All right. I just don't see any purpose of going on. I don't think -- I felt that if you could show that there was discrimination, I may be -- I may have

missed the entire boat and you may be able to point that out on appeal, but I think you have to show among the -- the workers that you have gotten rid of that there was discrimination on the basis of age; not on -- in the whole group, of every striker that went out. You had how many strikers went out; four or five hundred strikers?

MR. PHILLIPS: Four or five hundred.

THE COURT: That went out. I don't know what percent -- Did I ever hear what percentage of those was under -- I know under the -- on the hundred and ninety two plaintiffs that you have about forty, but what percentage of the -- Well, you do have that in here. I don't recall offhand.

MR. SMITH: I don't recall the percentage, Your Honor.

THE COURT: You've got it broken down in there.

MR. PHILLIPS: Seven -- About seventy five percent of the -- of the Plaintiffs are strikers -- excuse me, are over forty, which is about the same percentage as the --

THE COURT: Oh, is it the same percentage --

MR. PHILLIPS: -- non-casuals.

THE COURT: -- overall?

MR. PHILLIPS: If you exclude the casuals of -- out of the work force from before the strike, it's about seventy percent over forty. See, the casuals are not on the

recall list because they're not -- they're not regular employees. And they would have no reason to resign because they don't have any benefits.

THE COURT: Well, of the strikers, I know that you have in there the -- the number, the several hundred strikers that you do have some charts in there based upon those under forty and there are a number of them under forty, and I just -- I don't think you've shown any discrimination based on age. So I'm going to grant the -- and we will discharge the Jury at this point. Would you bring the Jury in?

MR. SMITH: Your Honor, do I understand that we're both to submit Proposed Findings by Friday, or are you --

THE COURT: If he wants to submit some proposed findings to -- that he wishes incorporated for appeal purposes; yes. He can --

MR. PHILLIPS: Well, Your Honor, I'd understood I'd see theirs by tomorrow morning.

THE COURT: Oh, that's -- okay.

APPENDIX B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 9 1991
Jesse E. Clark, Clerk
By Deputy: /s/ K. Sander

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES E. HAMILTON,	*	
ET AL.,	*	
Plaintiffs	*	
v.	*	C.A. H-87-2324
THE GROCERS SUPPLY	*	
COMPANY, INC.,	*	
Defendant	*	ORDER

Based upon the evidence introduced at trial and based upon the testimony of the Plaintiffs' witnesses, the Court makes the following findings:

FINDINGS OF FACT

1. Defendant, the Grocers Supply Company, Inc., is a corporation organized and existing under the laws of the State of Texas, and has its principal office and place of business at 3131 East Holcombe Street in the city of Houston, Texas, within the territorial jurisdiction of this Court. The Defendant is engaged in the business of grocery supply and interstate commerce and at all times mentioned herein was an employer in an industry affecting commerce within the meaning of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*

2. The most recent collective bargaining agreement between the Company and the Teamsters was effective April 7, 1985, and was extended by oral agreement until December 13, 1986.

3. On December 21, 1985, the bargaining unit employees (including the Plaintiffs) struck the Company, which strike lasted until April 3, 1987, when the bargaining unit made an unconditional offer to return to work.

4. The December 21, 1986, strike was an economic strike.

5. In order to continue to operate its business, the Company hired temporary replacement workers to perform the work of the bargaining unit during the strike.

6. Approximately four weeks after the beginning of the strike, the Company exercised its right to change the status of the replacement workers from temporary to permanent.

7. When the strike ended, all of the striking workers (including the Plaintiffs) were not recalled to work.

8. The Company's work force prior to the strike was an average age in years of 43.3, with an average seniority of 14.3 years.

9. Sixty-three per cent of the work force prior to the strike were over the age of 40.

10. The employees hired to permanently replace the striking workers had an average age in years of 31.5.

11. In April, 1987, the Defendant entered into an agreement with Teamsters Local 968 to recall strikers as job openings came about by department and by classification.

12. When the strike ended, all of the striking workers (including the Plaintiffs) were not recalled to work.

13. During the recall period, the Company hired new employees from outside the recall list whose average age in years was 26.2.

14. During the recall period, the Company used labor pool personnel to perform duties previously performed by bargaining unit employees as represented on Defendant's Exhibit Number 39.

15. During the recall period, the Company treated employees awaiting recall who resigned as ineligible for recall. The Company did not, however, consider employees who resigned as ineligible for re-employment upon proper application for employment.

16. The Company's decision to permanently replace the strikers did not discriminate against the Plaintiffs on the basis of their age.

17. The Company's decision to permanently replace the Plaintiffs was based on legitimate business reasons and reasonable factors other than age.

18. The Company's failure to rehire all the strikers after April 3, 1987, did not discriminate against the Plaintiffs on the basis of their age.

19. The Company's failure to rehire all the Plaintiffs after April 3, 1987, was based on legitimate business reasons and reasonable factors other than age.

20. Neither the Company's decision to permanently replace the strikers nor its failure to rehire all the strikers had an adverse impact against the Plaintiffs on the basis of age.

21. The recall list established by the Company was based primarily upon the seniority of the workers with minor adjustments made to the order of recall based upon objective, adverse facts in a worker's history. The recall list did not discriminate against the strikers on the basis of age.

Based upon the above findings of fact, the Court concludes as follows:

CONCLUSIONS OF LAW

1. In considering a motion for directed verdict, the Court should consider all of the evidence -- not just the evidence which supports the non-movant's case -- but in the light most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable persons could not arrive at a contrary verdict, granting of the motion is proper. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*).

2. The parties disagree as to the elements of the *prima facie* applicable to the facts of this case. This Court has previously ruled that the Plaintiffs could make a *prima facie* case by showing (1) the Company refused to consider recall applications of protected employees over forty (40) years of age; (2) applications for recall were accepted from

workers under forty (40) years of age; and (3) the protected workers were qualified for the jobs. *See* Order of May 6, 1991. Reviewing the record under the *Boeing* test, the Court concludes that the Plaintiffs have failed to satisfy the elements of this *prima facie* case.

3. Plaintiffs in this case can show age discrimination by showing that younger employees on the recall list were recalled before older employees on the recall list; or that younger workers on the recall list were given preferential treatment by the Defendant.

4. No reasonable person could conclude that the Company's actions with regard to the recall of previously striking employees, or the failure to recall such individuals, demonstrates an inference of unlawful age discrimination.

5. No reasonable person could conclude that the Company's decision to permanently replace its striking work force was motivated by unlawful age discrimination.

Every finding of fact that is more properly deemed a conclusion of law is hereby so deemed; every conclusion of law that is more properly deemed a finding of fact is hereby so deemed. It is, therefore,

ORDERED that judgment is entered for Defendant.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 5th day of September, 1991.

/s/ George A. Kelt
George A. Kelt
United States Magistrate Judge

APPENDIX C

190
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 9 1991
Jesse E. Clark, Clerk
By Deputy: /s/ K. Sanders

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES E. HAMILTON	*	
ET AL.,	*	
Plaintiffs	*	
v.	*	**C.A. H-87-2324**
THE GROCERS SUPPLY	*	
COMPANY, INC.,	*	
Defendant	*	**FINAL JUDGMENT**

Judgment is entered for Defendant.

This is a Final Judgment.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 5th day of September, 1991.

/s/ George A. Kelt
George A. Kelt
United States Magistrate Judge

APPENDIX D

Richard L. BRITT and Timothy Jackson, Jr., et al., Plaintiffs-Appellants,

v.

The GROCERS SUPPLY COMPANY, INC., Defendants-Appellee.

James E. HAMILTON, et al., Plaintiffs-Appellants,

v.

The GROCERS SUPPLY COMPANY, INC., Defendant-Appellee.

Nos. 91-2493, 91-6043.

United States Court of Appeals, Fifth Circuit.

Dec. 15, 1992.

Striking employees replaced by allegedly younger workers brought age discrimination action and claim that employer had breached contract in replacing workers. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 760 F.Supp. 606, entered judgment for employer. Appeal was taken. The Court of Appeals, Duhé, Circuit Judge, held that: (1) Age Discrimination in Employment Act was not preempted by National Labor Relations Act; (2) employees had not established violation of Age Discrimination in Employment Act, to degree sufficient to survive summary judgment; and (3)

employer's actions did not constitute violation of labor contract.

Affirmed.

1. Federal Courts 666

All employees bringing age discrimination claim against employer were included in an appeal from adverse decision of district court, even though they were not individually identified in notice of appeal; notice stated that it covered all plaintiffs who had filed their written consent to be included in lawsuit. F.R.A.P. Rule 3(c), 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

2. Civil Rights 332

The Age Discrimination in Employment Act was exclusive remedy for age discrimination claims, and was not preempted by National Labor Relations Act. National Labor Relations Act, §§ 1-303, as amended, 29 U.S.C.A. §§ 151-187; Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

3. Civil Rights 380

Once an age discrimination claimant establishes prima facie case, presumption of discrimination is established and burden of production shifts to employer to rebut presumption by articulating legitimate, nondiscriminatory reason for its disparate treatment of claimant, following which claimant must prove defendant's reasons are pretexts for unlawful discrimination either by showing discriminatory reason more

likely motivated employer or employer's reason is unworthy of credence. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

4. Civil Rights 389

Assuming that striking workers at food handling facility had established prima facie case of age discrimination in connection with employer's response to a strike, they failed to establish fact issue as to whether the employer's reasons for hiring temporary employees as permanent employees, gratitude, departure of these employees to take other jobs, and striker misconduct, were pretexts masking age discrimination; reliance upon stray remarks that replaced workers were "older" and fact that replaced workers had higher salaries and more seniority, were not sufficient. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

5. Labor Relations 264

Employer did not breach contract with union, allegedly calling for rehiring of striking employers if they immediately agreed to cease strike, by engaging in selective reemployment of striking workers; there was no evidence that union had ever accepted employer's offer to so rehire, and union subsequently agreed to an unconditional return to work. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. §185.

6. Labor Relations 416.5

Striking employees were precluded from claiming that employer had breached a recall agreement, by failure to follow binding arbitration provisions in collective bargaining

agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A § 185.

7. **Damages** **50.10**
States **18.15**
Torts **6**

State law causes of action of duress and intentional infliction of emotional distress, based upon alleged violation of contract between employer and union governing the recall of striking workers, was not preempted by the National Labor Relations Act. National Labor Relations Act, §§ 1-303, as amended, 29 U.S.C.A. §§ 151-187.

8. **Damages** **50.10**
States **18.15**
Torts **6**

State law claims of duress and intentional infliction of emotional distress, arising out of an employer's failure to recall striking employees due to age discrimination, were not preempted by the Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

9. **Torts** **6**

Employer did not commit state law tort of duress by declining to restore all striking workers to their previous positions; employer was merely insisting on its legal right in a permissible way.

10. **Damages** **50.10**

Employer did not commit state law tort of intentional infliction of emotional distress by declining to restore all

striking workers to their previous positions; employer was merely insisting on its legal rights in permissible way.

Appeals from the United States District Court for the Southern District of Texas.

Before **REAVLEY, HIGGINBOTHAM,** and **DUHÉ,** Circuit Judges.

DUHÉ, Circuit Judge:

These two cases were consolidated on appeal, but tried separately. Both suits were brought by groups of former employees of Grocers Supply Company. The Britt plaintiffs appeal the district court's holding that the National Labor Relations Act, 29 U.S.C. § 151 - 187 (1988), pre-empts claims of age discrimination asserted under the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (1988). They also appeal the district court's granting summary judgment on the merits of their age discrimination claims. 760 F.S. 606. The Hamilton plaintiffs appeal the district court's granting a directed verdict in favor of the defendants on the plaintiff's age discrimination claims. They also appeal the district court's granting summary judgment on their claims of breach of contract and intentional infliction of emotional distress and duress. The defendant, Grocers Supply, argues that the Britt plaintiffs' notice of appeal is insufficient under Rule 3(c) of the Federal Rules of Appellate Procedure. We find that the Age Discrimination in Employment Act (ADEA) controls this litigation and not the National Labor Relation Act (NLRA) and that notice of appeal by the Britt plaintiffs was sufficient under Rule 3(c) and its interpretation in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). Additionally, we find no error in the summary judgment in the Britt

case, nor do we find error in the directed verdict or summary judgment in the Hamilton case. In sum, we disagree with the district court on the preemption issue but affirm its judgment.

STATEMENT OF FACTS

The underlying facts in both cases are the same. In December 1986, the work force of Grocers Supply Company, a Texas Corporation, went on strike after contract negotiations broke down. The work force consisted primarily of employees over forth years old. Grocers Supply immediately hired replacement workers to continue its operations. The replacement workers were told that their positions were temporary; sometime before the end of the strike, however, Grocers offered them permanent positions. Negotiations failed, and in April 1987, the striking workers made an unconditional offer to return to work. The Union explained to the workers that they could return to work only when Grocers needed them. In fact, Grocers and the Union negotiated a "recall" agreement to govern the order of recall as vacancies occurred. The Hamilton plaintiffs contend that this offer to return to work was made in response to a promise by Grocers that if the workers would return unconditionally, they would all be rehired within a few weeks.

Very few of the former workers were ever recalled. Grocers maintains that it simply had a few hiring needs during this period due to the low turnover and increased productivity of its new workers. The Plaintiffs assert that the slow rehiring and the undesirability of those jobs offered was purposefully orchestrated to reduce the age of the work force and to encourage older workers to retire and take their retirement benefits.

Two groups of workers sued Grocers as a result of their failure to be recalled. Richard L. Britt and Timothy Jackson, Jr., individually and on behalf of others similarly situated, with 126 additional plaintiffs opting in,[1] assert only a ADEA claim. They contend that their "permanent replacement" was a sham and that they were refused reinstatement because of their age. The district court granted summary judgment on this claim based on two grounds. First, the court held that the ADEA claim was preempted by the NLRA. Second, the district court held that Britt failed to demonstrate a genuine issue of material fact on the discrimination claim sufficient to survive judgment.

James E. Hamilton, et al. assert an ADEA claim, a 29 U.S.C. § 301 breach-of-contract claim, and state law claims of intentional infliction of emotional distress and duress. The district court granted summary judgement for Grocers on both the § 301 contract claim and the state law claims. The ADEA claim went to trial, but the district court directed a verdict for Grocers at the close of Hamilton's evidence.

DISCUSSION

I. *Notice of Appeal.*

[1] Before addressing other issues, we must address whether the Notice of Appeal for the Britt plaintiffs is sufficient. Grocers contends that the notice is insufficient to satisfy the specificity requirement under Federal Rule of Appellate Procedure 3(c) and its interpretation under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct 2405, 101 L. Ed. 2cd 285 (1988).

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1. For simplicity purposes, the plaintiffs in each case will be referred by the named individual plaintiffs, Britt and Hamilton.

Rule 3(c) provides that a notice of appeal "shall specify the party or parties taking the appeal." In *Torres*, the Supreme Court interpreted FRAP 3(c) strictly and held that the designation "*et al.*" in the notice of appeal rather than the name of the appealing party resulted in a failure of that party to appeal, thus depriving the appellate court of jurisdiction.

"The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 487 U.S. at 318, 108 S.Ct. at 2409. The problem facing the Supreme Court in *Torres* was that the use of *et al.*, with nothing further, left it uncertain which parties were taking the appeal. The Court held that thus designating the appealing parties "would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment. "*Id.* The Court, however, went on to state that the specificity requirement of Rule 3(c) may be met "by some designation that gives fair notice of the specific individual or entity seeking to appeal." *Id.*

The plaintiffs in the Britt case consist of the original named plaintiffs, Richard Britt and Timothy Jackson, and another 126 optin plaintiffs under 29 U.S.C. § 216(b). The Notice of Appeal was styled "Richard L. Britt and Timothy Jackson, Jr., et al." The body of the notice, however, identified the remaining appellants as "all other 129 consenting Plaintiffs who have previously filed their written consent persuant to 29 U.S.C. Section 216(b)."[2] Because the notice

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2. Grocers also argues that the notice is uncertain because it refers to 129 opt-in plaintiffs and in reality only 126 persons had opted into the action. Apparently, the 129 was a typographical error. This argument is without merit. If "all 129" were appealing , it follows that the 126

in this case states that all of a particular defined group are taking an appeal, and the individual identities are readily ascertainable in the record, the specificity requirement is satisfied. Such a designation is sufficient to give fair notice of the individuals appealing.

The cases relied on by Grocers involve situations in which the unnamed appellants could be included only if the term "et al.", with nothing further, was considered specific enough to satisfy Rule 3(c). The Notice of Appeal in this case is distinguishable. The plaintiffs, other than the two named plaintiffs, were clearly identified as those parties "who filed their written consent" as required by Section 216(b). Their identities are in the record. Rule 3(c) does not require that all the plaintiffs be identified by given and surname in the notice of appeal. This Court has stated that it "has looked to the purpose rather than the letter of Rule 3(c)'s specificity requirement" when determining the sufficiency of a notice of appeal. *Brotherhood of Ry. Carmen v. Atchison T. & S.F.Ry.*, 894 F.2d 1463, 1465 n. 3(5th Cir.), *cert. denied* — U.S. —, 111 S.Ct. 131, 112 L.Ed.2d 99 (1990).

Additionally, this Court has recognized that in some circumstances even the designation "et al." is sufficient to identify the parties. In *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127, 129 (5th Cir. 1989), this Court held that the use of "et al." is sufficient if there are only to parties to the suit. Thus, it is not necessary to list the names of each appealing party, as long as there can be no mistake about which parties are intending to appeal. If papers are filed in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is

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plaintiffs that Grocers was aware of were all appealing.

the functional equivalent of what the rule requires. *See Torres*, 487 U.S. at 317, 108 S.Ct. at 2408; *see also Houston v. Lack*, 487 U.S. 266, 273-75, 108 S.Ct. 2379, 2383-84, 101 L.Ed.2d 245 (1988). Unlike the defendant in *Torres*, Grocers had fair notice of the identity of the Appellants. Consequently, its argument that this Court lacks jurisdiction over Britt's appeal must fail.

II. The Preemption Issue.

[2] Turning to the question whether this Court has jurisdiction over the age discrimination claims, we hold that this Court does have jurisdiction to hear the claims asserted under the Age Discrimination in Employment Act (ADEA).[3] More specifically, we hold that, to the extent the age discrimination claims encompass conduct that is arguably covered by the National Labor Relations Act, the ADEA governs the prosecution of those claims and not the NLRA.

The issue of the jurisdiction of this Court was raised on appeal in the Britt case. Although not raised by the Hamilton plaintiffs, it is our duty to determine, *sua sponte*, if necessary, whether we have jurisdiction over any case before us. *Griffith v. Johnston*, 899 F.2d 1427, 1429 (5th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 712, 112 L.Ed.2d 701 (1991); *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83 (5th Cir. 1990). Therefore, our decision on this issue affects the disposition of both cases on this appeal.

A. Preemption Analysis

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3. If the NLRA preempts the ADEA, then primary jurisdiction of this dispute lies with the NLRB and not the courts.

Whether the NLRA preempts the ADEA, or vice versa, is an issue of first impression before this court. The district court in the Britt case determined, in a summary judgment proceeding, that the plaintiffs' ADEA claims were preempted by the NLRA. The court alternatively held that, on the merits of the ADEA claim, the plaintiffs failed to establish a genuine issue of fact and granted the defendant's motion for summary judgment. The defendants in the Hamilton case also argued that the NLRA preempted the ADEA; however, the district court overruled this argument without explanation. The plaintiffs later lost on the ADEA claims by a directed verdict.

The district court in Britt, in determining that the NLRA preempted the ADEA, relied on *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). We believe, however, that such reliance is misplaced. Moreover, Grocers' application of the preemption doctrine in its argument on appeal is also flawed.

The preemption doctrine in labor law has evolved for more than three decades around a conceptual core with various appendages.[4] An initial line of preemption analysis, developed in *San Diego Building Trades Council v. Garmon*[5] and its progeny, was based predominantly on the primary jurisdiction of the National Labor Relations Board (NLRB). A second line of analysis also developed in cases "focusing upon the crucial inquiry whether Congress intended that the

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4. *See* 2 Charles J. Morris, *The Developing Labor Law* 1504-1598 (2d ed. 1983); Charles J. Morris, *The Developing Labor Law*; 1982-1988, 650-690 (2d ed. Supp. V 1989).

5. 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). This type of preemption is called "Garmon" preemption.

conduct involved be unregulated because [it has been] left 'to be controlled by the free play of economic forces.'"[6] The resulting preemption doctrine reflects the Supreme Court's efforts to accommodate conflicting regulatory schemes without the need to take a strictly mechanistic approach to the discrete problems involved.

The preemption doctrine is anchored in the Supremacy Clause of the Constitution. In determining the areas of labor law in which the states have overstepped their bounds, the Supreme court has focused on Congress' actual regulation of labor relations rather than Congress' potential power to regulate in this area.

Since the enactment of the NLRA, the Supreme Court has justified the results of its preemption decisions in terms of perceived congressional intent to preempt, although the Act provides no specific guidance for applying this principle in individual instances of regulatory conflict. As the theory of preemption has evolved, the more recent cases reflect the difficulty of discerning congressional intent and instead appear to have been decided upon considerations of labor relations policy. *See Windfield v. Groen Div., Dover Corp.*, 890 F.2d 764, 766-68 (5th Cir. 1989).

As stated in *Windfield*, the courts have carved out several significant exceptions to the preemption doctrine. One such exception is the "collateral issue" exception. In *Connell Construction Co. v. Plumbers & Steamfitters Local*

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6. *Lodge 76, International Ass'n of Machinists & Aerospace Workers, v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 2553, 49 L.Ed.2d 396 (1976). This type of preemption is sometimes called "Machinist" preemption.

Union No. 100, 421 U.S. 616, 626, 95 S.Ct. 1830, 1836, 44 L.Ed.2d 418 (1975), the Court held that a *federal* antitrust law was *not* preempted by the NLRA under the collateral issue exception. Under *Garmon*, however *state* antitrust law was preempted. The Court held that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Id.* at

626, 95 S.Ct. at 1837. As an independent federal remedy, the ADEA falls under this exception.[7] Traditional preemption analysis, however, is still not quite satisfactory.

B. Preemption and Conflicts between Federal Statutes

Because the root of the preemption doctrine lies in the tension between federal and state regulation of labor relations, the analysis of the tension between two conflicting federal statutes is somewhat different. A number of cases reflect this awareness.[8] In *United States v. Boffa* 688 F.2d

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7. Although the Court calls this an exception to the preemption doctrine, the analysis is more comparable to that of *Hood v. Smith's Transfer Corp.*, 762 S.Supp. 1274 (W.D.Ky. 1991), discussed *infra*, which candidly recognized that the preemption doctrine does not apply in situations where two federal statutes conflict.

8. In *United States v. International Brotherhood of Teamsters*, 948 F.2d 98 (2d Cir. 1991), *vacated sub nom. Yellow Freight Systems, Inc. v. United States*, — U.S. —, 113 S.Ct. 31, — L.Ed.2d — (1992) (No. 91-1938), the court determined that the district court was entitled to exercise jurisdiction over the parties pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988), and was not preempted from that jurisdiction by the authority of the NLRB to determine issues concerning unfair labor practices under the NLRA. The following excerpt illustrates the inapplicability of the traditional preemption analysis when two federal statutes are involved.

[Appellant] contends that the conduct at issue in this case is directly regulated by sections 7 and 8(a)(1) of the NLRB. . . and accordingly that the NLRB has exclusive jurisdiction with respect to it. In this connection, *San Diego Building Trades Council v. Garmon*, . . . a case involving attempted state regulation of conduct constituting an NLRA unfair labor practice, stated that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB], if the danger of state interference with national policy is to be averted." . .

This rule, however, is not uniformly applied even as to state regulation. *See, e.g., Sears Roebuck & Co. v. San Diego County Council of Carpenters...* (enforcement of state trespass laws by state court allowed as to "picketing which is arguably-but not definitely-prohibited or protected by federal law") Furthermore, where federal law and policies other than the NLRB are implicated, the *Garmon* rule is frequently considered inapplicable. *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989) ...(district court had jurisdiction to hear fair representation claim although union's breach of duty of fair representation might violate § 8(b) of the NLRA); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 237-39, 91 S.Ct. 609, 612-13, 28 L.Ed.2d 10 (1971)(district court had jurisdiction to hear claim that unlawful expulsion from union violated § 101(a)(5) of Labor-Management Reporting and Disclosure Act ... although expulsion was arguably an unfair practice violative of §§ 8(b)(1)(A) and 8(b)(2) of NLRA); ... *United States v. Boffa*, 688 F.2d 919, 931 (3d Cir. 1982) (in RICO prosecution alleging mail fraud predicates and substantive mail fraud violations, prohibitions of defendants' conduct by § 8 of the NLRA would not preclude "enforcement of a federal statute that independently proscribes that conduct"). *cert. denied*, 460 U.S. 1022,

919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022, 103 S.Ct. 1272, 75 F.Ed.2d 494 (1983), the issue was whether the doctrine of primary jurisdiction operated to displace a federal criminal statute that independently prohibited conduct that is also arguably prohibited by the NLRA. In rejecting preemption by the NLRA, the court stated "the doctrine of primary NLRB jurisdiction is of constitutional dimension; it is grounded, at least in part, upon considerations of federal supremacy . . . . No such constitutional concerns are implicated when a federal criminal statute is said to impinge upon the primary jurisdiction of the NLRB." *Id.* at 932.

Hood v. Smith's Transfer Corp., 762 F.Supp. 1274 (W.D.Ky. 1991), provides the most comprehensive discussion of the preemption doctrine and its relation (or lack thereof) to the analysis of two conflicting federal statutes. In holding that the preemption doctrine has no application when two federal statutes conflict, the court determined that the ultimate resolution of the issue depended upon whether: "(1) the unfair labor practices alleged by defendants are merely collateral to plaintiffs' non-NLRA federal claims and (2) plaintiffs' non-NLRA federal claims arise under statutes which provide independent federal remedies." *Id.* at 1283. In the case we are considering the plaintiffs' non-NLRA federal claims arise under the ADEA which provides an independent federal remedy.

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103 S.Ct. 1272, 75 L.Ed.2d 494 (1983). Here, although the appointed officials are directly applying the NLRA rather than some separate body of law, considerations that we have previously recognized with respect to the Consent Decree argue compellingly for a ruling against exclusive NLRB jurisdiction. *Id.* at 105 (emphasis added) (some citations omitted).

Additionally, we have held that claims under Title VII are not preempted by the NLRA[9] These cases hold that a remedy is available under both the NLRA and Title VII and recognize concurrent jurisdiction between Title VII and the NLRA.[10]

As evidence by the discussion above, traditional preemption analysis does not apply in a conflict between two federal statutes.

C. Hobbs v. Hawkins

The most recent case in this Circuit to apply the preemption doctrine is *Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992). The analysis in *Hobbs*, however, is inapplicable in this case. This decision holds that a claim under 42

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9. We have recognized that Title VII and the NLRA are statutes with separate and independent remedies. *See Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 658 (5th Cir. 1974), *overruled on other grounds by Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987), *vacated* 492 U.S. 901, 109 S.Ct. 3207, 106 L.Ed.2d 558 (1989), *reinstated on remand*, 887 F.2d 609 (5th Cir. 1989), *cert. denied*, 494 U.S. 1061, 110 S. Ct. 1539, 108 L.Ed.2d 778 (1990). The *Guerra* panel noted that

> through Title VII and the NLRA may overlay in the area of employment discrimination, their confluence must not be exaggerated .... [A] plaintiff does not lose his right to an adjudication regarding the causes of action created by Title VII ... simply because the conduct of which he complains also offends section 8 of the NLRA.

Guerra, 498 F.2d at 658 n. 46.

10. *Guerra*, 498 F.2d at 651 n. 20, and cases cited therein. Because of the cases holding that the ADEA is the *exclusive remedy* for age discrimination claims and those cases rejecting an analogy between Title VII and the ADEA, we decline to hold that the courts under the ADEA and the NLRB have concurrent jurisdiction over these claims.

U.S.C. § 1983 is preempted by the NLRA. *Hobbs* employs traditional preemption analysis which considers the relationship between federal and state regulation of labor relations rather than addresses the problems involved with conflicting federal statutes. *Hobbs* is unique, however, because the plaintiff's claims arose specifically under the NLRA (§ 7, § 8, and § 9), and were asserted as such. The plaintiff merely tried to enforce these NLRA claims through § 1983.

Section 1983 does not create substantive rights, but was designed to provide a remedy for violations of other statutory as well as constitutional rights. Many cases hold that, where Congress has enacted a statute that covers a *specific substantive area* providing *specific remedies*, a cause of action under § 1983 is foreclosed. In the case at hand, the ADEA covers a specific substantive area of the law and provides a specific remedy for violations of the statute. As a result, a number of cases also hold that an age discrimination claim brought under §1983 is preempted by the ADEA. Therefore, contrary to Grocers' assertions, the analysis in *Hobbs* does not control in this case.

D. The Exclusivity of the ADEA

Finally, a decision that the NLRA preempts the ADEA cannot be reconciled with the many cases holding that the ADEA is the exclusive remedy for age discrimination claims. *See White v. Frank*, 718 F.Supp. 592, 595 (W.D-.Tex 1989), *aff'd*, 895 F.2d 243, (5th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990); *Paterson v. Weinberger*, 644 F.2d 521, 524-25 (5th Cir. 1981); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir. 1989), *cert. denied*, 493 U.S. 850, 110 S. Ct. 147, 107 L.Ed.2d 106 (1989); *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983); *Ring v. Crisp County Hosp. Auth.* 652 F.Supp. 477, 482 (M.D.Ga. 1987); *Dodson*

v. U.S. Army Fin. & Accounting Ctr., 636 F.Supp. 894 (S.D.Ind. 1986); *Morgan v. Humboldt County School Dist.* 623 F.Supp. 440 (D.C.Nev. 1985); *Tranello v. Frey*, 758 F.Supp. 841 (W.D.N.Y. 1991), *aff'd*, 962 F.2d 244 (2d Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (U.S. Sept. 29, 1992) (No. 92-704). This has been the holding in cases

of both federal employment and non-federal employment. Additionally, all of these cases hold that the ADEA preempts another federal statute.

In analyzing, whether the ADEA preempted § 1983, the court in *Ring v. Crisp County Hospital Authority, supra*, articulates the general rule: a precisely drawn, detailed statute preempts more general remedies. Because of the comprehensive statutory scheme set out under the ADEA and the lack of any legislative history indicating a contrary congressional intent, the *Ring* court concluded that the ADEA is the exclusive remedy for age discrimination. The court rejected an analogy to Title VII which has been held to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The court found that unlike Title VII, nothing in the legislative history of the ADEA indicated that Congress did not intend the ADEA to be the exclusive remedy. "By establishing the ADEA's comprehensive scheme for the resolution of employee complaints of age discrimination, Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA." *Ring*, 652 F.Supp. at 482. The court concluded that the ADEA provided the exclusive remedy for claims of age discrimination, whether those claims are founded on the Constitution or on rights created by the ADEA. We agree.

In a similar analysis, the Fourth Circuit in *Zombro v. Baltimore City Police Dept.* noted that "[t]he text and context of the ADEA itself confirm this conclusion [that ADEA is exclusive remedy]: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures, provided in sections 211(b), 216 ...' 29 U.S.C. § 626(b). Section 216 is a part of the Fair Labor Standard Act (FLSA) ..., and it has been held that the statutory remedy of that section is the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA." 868 F.2d at 1369 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp 1027 (N.D.Cal. 1972)). The court concluded that the provisions of the ADEA evidence congressional intent to subject all age discrimination claims to the comprehensive statutory scheme clearly embodied in the language and legislative history of the ADEA.

In discussing the procedural requirement of the ADEA, one federal district court stated:

> The inescapable conclusion that is drawn from the foregoing is that if other modes of enforcement were available to the private litigant, the congressional scheme behind ADEA enforcement could easily be thwarted. An impatient plaintiff might unilaterally dispense with the informal negotiations contemplated by Congress, needlessly casting all concerned into costly litigation. Congress did not intend to allow a plaintiff to bypass the statutory scheme clearly embodied in the language of the ADEA. The only reasonable construction of the Act is that the statute's remedy is exclusive.

McCroan v. Bailey, 543 F.Supp. 1201, 1209 (S.D.Ga. 1982). In sum, based on (1) the above cases holding that the ADEA is the exclusive remedy for age discrimination claims, (2) the cases holding that traditional preemption analysis does not apply when two federal statutes conflict, and (3) the inapplicability of extending the federal/state policy considerations guiding traditional preemption analysis to conflicts between federal statutes, we conclude that Congress intended the ADEA to be the exclusive remedy for age discrimination claims. Accordingly, we disagree with the district court's holding that the ADEA is preempted by the NLRA, and conclude that this Court has jurisdiction under the ADEA to entertain the plaintiffs' age discrimination claims.

III. Summary Judgment on Britt's ADEA Claims and Directed Verdict on Hamilton's ADEA Claims.

Having determined that this Court has jurisdiction over the age discrimination claims, we review both the district court's granting of summary judgment in Grocers' favor on Britt's claims and the district court's directing a verdict in Grocers' favor on Hamilton's claims. After reviewing the merits of the claims, we affirm the respective decisions of the district courts.

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no

genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). Finally, as the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 256, 106 S.Ct. at 2514 (citations omitted). The Court also held that the standard of review for a directed verdict is the same as that for review of a summary judgment. *Id.* at 250, 106 S.Ct. at 2511.

In addition, a reviewing court is not limited to the district court's reasons in affirming a grant of summary judgment. This Court may affirm on grounds other than those relied upon by the district court when the record contains an adequate and independent basis for that result. *Guthrie v. Tifco Indus.*,941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, — U.S. — , 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992); *Schuster v. Martin*, 861 F.2d 1369, 1371 (5th Cir. 1988).

When no direct evidence of age discrimination exists, the evidentiary procedure generally adapted to the ADEA context is that announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). *See Bienkowski v. American Airlines*, 851 F.2d 1503 (5th Cir. 1988). Initially, the plaintiff must prove a *prima facie* case of age discrimination. The elements of a *prima facie* case are hotly disputed

in these two cases.[11] The elements of a *prima facie* case may be somewhat flexible in an ADEA case according to the facts in issue. *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980). Because we affirm the district courts on an alternative basis, it is unnecessary to resolve the issue of what the proper elements of a *prima facie* case should be.

[3] If the plaintiff proves his *prima facie* case, a presumption of discrimination is established. The burden of production then shifts to the defendant to rebut this presumption by articulating a legitimate, nondiscriminatory reason for its disparate treatment of the plaintiff. *Id.* Finally, the plaintiff must prove that the defendant's reasons are pretexts for unlawful discrimination either by showing: (1) that a discriminatory reason more likely motivated the defendant or (2) that the defendant's reason is unworthy of credence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207

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11. The district court in the Britt case held that a *prima facie* case consists of evidence that a plaintiff (1) was discharged, (2) was qualified for the position, (3) was within the protected class at the time of discharge, (4) was replaced by someone outside the protected class, or (5) by someone younger, or (6) show otherwise that his discharge was because of age (citing *Bienkowski*, 851 F.2d at 1505).

The district court in the Hamilton case held that the plaintiffs could establish a *prima facie* case by showing (1) the company refused to consider recall applications of protected employees over forty years of age; (2) applications for recall were accepted from workers under forty years of age; and (3) the protected workers were qualified for the jobs.

Both the plaintiffs and Grocers each articulate a different version of what they believe the correct test for establishing a *prima facie* case should be.

(1981). The plaintiff retains the burden of persuading the fact finder that impermissible discrimination motivated the adverse employment decision. *Id.*

[4] Both Britt and Hamilton contend that Grocer's replacement of employees with others, some of whom were allegedly younger, was motivated by the age of the strikers and violated the ADEA. The district courts in both Britt and Hamilton held that the plaintiffs had failed to make out a *prima facie* case under the act.

As this Court has stated "it is relatively easy both for a plaintiff to establish a *prima facie* case and for a defendant to articulate a legitimate, non-discriminatory reason for his decision." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 811 (5th Cir. 1991). Because neither plaintiff can show that the defendant's reasons for disparate treatment of the plaintiffs are pretexts for unlawful discrimination, however, we see no need to rummage through the arguments over whether the plaintiffs have established a *prima facie* case. In the context of summary judgment or directed verdict, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. Bother Britt and Hamilton fail to do so.

Grocers contends that its decision to convert the temporary employees into permanent employees was motivated by several concerns: (1) its gratitude to these individuals for keeping the company in operation during the strike; (2) that these temporary employees were leaving to take jobs elsewhere; and (3) striker misconduct. In the Britt case, the plaintiffs offered several affidavits in an attempt to establish pretext. The evidence in these affidavits offered to show age-related employment decisions consists of what are at best characterized as stray remarks by three Grocers employees

concerning the age of the workers. This Court has ruled that similar statements are insufficiently probative to create a jury issue in and ADEA case. *Guthrie v. Tifco*, 941 F.2d at 379; *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 565 (5th Cir. 1983); *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984); *Stendebach v. CPC Int'l, Inc.*, 691 F.2d 735, 738 (5th Cir. 1982), *cert. denied*, 461 U.S. 944, 103 S.Ct. 2122, 77 L.Ed.2d 1302 (1983). These statements are insufficient to show either that (1) a discriminatory reason more than likely motivated Grocers or (2) Grocers' explanation is unworthy of credence.

The Hamilton plaintiffs relied on much the same evidence in presenting their case for trial as did the Britt plaintiffs in the summary judgment proceeding. This evidence even considered with the additional evidence adduced at trial is insufficient to rebut Grocers' reasons for failing to recall the strikers. As the district court found, Grocers may have been reluctant to rehire these workers, but the evidence is insufficient to establish that the reason for this reluctance was age discrimination.

Contrary to plaintiffs' assertions, Grocers was under no obligation to notify the plaintiffs that they were being replaced. Nor does this lack of notification imply a bias based on age. Hamilton also challenges Grocers' practice of refusing to recall anyone who resigned to obtain his benefits. The theory is that Grocers coerced older workers into resigning to obtain their pension benefits, thereby discriminating against these workers based on age. Nothing in the record supports this claim. Additionally, we do not see how this practice harms older plaintiffs.

Hamilton asserts that the strikers were replaced because of their seniority and higher salaries, and that such an action supports an inference of age discrimination. This

Court, however, has stated repeatedly that "[s]eniority and age discrimination are unrelated." *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n. 17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *see also Amburgey*, 936 F.2d at 813. Hamilton relies on *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir.), *cert. denied*, 490 U.S. 1098, 109 S.Ct. 2448, 104 L.Ed.2d 1003 (1989), to support this contention. *Uffelman* is distinguishable, however, because, by terminating Uffelman, the employer was able to avoid paying Uffelman's retirement benefits as he was nine months away from vesting. In this case, Grocers actually paid substantial retirement benefits to strikers who resigned. Finally, the comparison of the age of workers at another Grocers' subsidiary with the age of workers at the location where the plaintiffs worked does not bolster this argument.

Hamilton offered as support of age discrimination evidence that during the recall, younger workers were hired to take regular positions, while older employees awaiting recall were offered only jobs in the frozen food warehouse.[12] The record does not support this contention. Additionally, this Court held in *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990), that offering a different job to the plaintiff did not raise a genuine issue of fact regarding pretext. We find the remainder of Hamilton's evidence equally unconvincing.

In sum, the appellants are left with nothing more than their speculation and belief that they were permanently replaced because of age. This type of evidence is insufficient to create a fact issue as to pretext. *Little v. Republic Refining Co.*, 924 F.2d 93 (5th Cir. 1991); *Laurence v. Chevron U.S.A., Inc.* 885 F.2d 280 (5th Cir. 1989).

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12. Plaintiffs complain that the recall offers were to frozen food selector positions, which they claim are undesirable.

Therefore, we uphold the summary judgment in the Britt case and the directed verdict in the Hamilton case.

IV. Summary Judgment of Hamilton's Section 301 Claims.

[5] The Hamilton plaintiffs base their § 301 claims on alleged agreements made between the union and Grocers in April of 1987. They contend that about April 2, 1987, Mr Ed Fox, Grocers' operations manager, offered to permit the return of the striking employees, if they immediately agreed to cease their strike. They further contend that this offer and acceptance constituted an employment contract between the company and the union, the breach of which is actionable under Section 301 of the LMRA, 29 U.S.C. § 185(a). Hamilton also asserts that a letter from Mr. R.S. Bambace to Mr. A. W. Parker agreeing to recall strikers as provided by *Laidlaw Corporation v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 100 (1970), also constituted an offer which was breached. The district court held that neither the oral agreement nor the letter constituted a contract for labor giving rise to a § 301 action, and granted Grocers' Motion for Summary Judgment. We affirm.

Under the L.M.R.A. § 301, 29 U.S.C. 185, a federal court has jurisdiction over breach-of-contract actions between an employer and a labor organization. The fact that an alleged contract was based on an oral agreement during negotiations does not make it unenforceable under §185. *Smith v. Kerrville Bus Co.*, 709 F.2d 914, 920 (5th Cir. 1983).

The evidence presented by Hamilton in support of the contract demonstrates that this promise was never considered a binding contract arrangement. A.E. Parker, the union negotiator to whom the alleged statements were made, did not regard the statement as an offer of a binding contract, nor does he show that the Union accepted such an offer. In fact, the strikers agreed to return to work unconditionally after the supposed agreement was made. The district court correctly dismissed the § 301 claim, because no evidence existed from which a jury could find that a contract existed between the strikers and the company.

[6] Hamilton's argument that the company breached the written recall agreement must also fail. This claim is barred by Hamilton's failure to pursue the appropriate arbitration remedies. Where a contract provides for binding arbitration, an employee may not sue his employer under § 301 unless he has exhausted those remedies. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L.Ed.2d 206 (1985). Hamilton does not dispute the existence of the arbitration provision or the failure to invoke it. Hamilton instead argues that, because Grocers repudiated the remedial procedures specified in the contract, *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518, 519 (5th Cir. 1978), requires that there was no need to exhaust the arbitration rights. We disagree. Grocers alleged misconduct is insufficient to invoke the repudiation exception.[13] We affirm the holding of the district court.

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13. Hamilton argues that Grocers repudiated the arbitration procedures by concealing its alleged breach of the recall agreement through its use of labor pool workers.

V. Summary Judgment on Hamilton's State Law Tort Claims.

[7-10] Hamilton alleges a cause of action for the state law torts of duress and intentional infliction of emotional distress. The district court held that these claims are preempted by provisions of the NLRA and the ADEA based on *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), and granted Grocers' Motion for Summary Judgment. We do not agree that Hamilton's claims are preempted under *Farmer*. However, we affirm the district court's holding. Hamilton's allegations of intentional infliction of emotional distress and duress are meritless. Grocers merely insisted on its legal rights in a permissible way. Under this Court's decision in *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1144 (5th Cir. 1991), that does not give rise to a cause of action. The decision of the district court is affirmed.

In sum, for the foregoing reasons, we disagree with the district court's holding in the Britt case that the NLRA preempts the ADEA. Because we agree with the district court's holdings on all other issues, the judgments are

AFFIRMED.

APPENDIX E

U.S. COURT OF APPEALS
FILED
MAR 01 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-6043

James E. Hamilton, et. al,
Plaintiffs-Appellants,

VERSUS

The Grocers Supply Co, Inc.
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM, AND DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:

The Hamilton plaintiffs request a rehearing on our ruling in *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441 (5th Cir. 1992). They contend that we erred in holding that the directed verdict on their ADEA claims should be sustained because they failed to show pretext. We agree, however, rehearing is denied because plaintiffs failed to establish a *prima facie* case.

The district court held that the plaintiffs failed to establish a *prima facie* case, and dismissed the case after the close of plaintiff's case-in-chief. Our decision affirmed the district court's decision, however, we affirmed on the grounds that the plaintiffs failed to show that the defendant articulated nondiscriminatory reasons for refusing to rehire plaintiffs constituted pretext. The Hamilton plaintiffs argue that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), requires a plaintiff in its case-in-chief to establish only a *prima facie* case. They contend that *McDonnell Douglas* establishes a three step burden shifting process in which the plaintiffs are required to show pretext only after the defendants have articulated a nondiscriminatory reason for failing to rehire. *McDonnell Douglas Corp.*, 411 U.S. at 802. Although plaintiffs argued before this Court that they had proven pretext, we agree that procedurally they are correct. We do not agree, however, that they are entitled to a rehearing.

The standard or review for a directed verdict is the same as that for review of a summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). We apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes

that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict and for JNOV] is proper." *Boeing Company v. Shipman*, 411 F.2d 365,374 (5th Cir. 1969)(en banc); *Little v. Republic Refining Co.*, 924 F.2d 93, 95 (5th Cir. 1991).

To establish a violation under the ADEA, the plaintiffs must show some adverse employment action by the defendant. *See Young v. Houston*, 906 F.2d 177 (5th Cir. 1990); *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503 (5th Cir. 1988). When the plaintiff has not introduced direct evidence of discrimination, he may still shift the burden of proof to the defendant by establishing a *prima facie* case as required by *McDonnel Douglas*. *Young*, 906 F.2d at 180. To make out a *prima facie* case, the plaintiff must prove the necessary elements "by a preponderance of the evidence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The elements of a *prima facie* case may be somewhat flexible in an ADEA case according to the facts in issue. *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980). *See Moore v. Sears, Roebuck & Co.*, 464 F.Supp. 357, 361-63 (N.D.Ga. 1979). The district court articulated a three part test that the plaintiffs had to meet in order to establish a *prima facie* case. They had to show (1) the company refused to consider recall applications of protected employees over forty years of age; (2) applications for recall were accepted from workers under forty years of age; (3) the protected workers were qualified for the jobs. The plaintiffs argue that this test is inappropriate under the facts in this case. We disagree.

The plaintiffs voluntarily went on strike, forcing the company to hire replacements. The replacements were eventually made permanent, and few of the striking workers were ever recalled. The plaintiffs claimed adverse treatment based on two of Grocers' employment decisions: (1) the

decisions to permanently replace the striking workers and (2) the failure to recall the strikers as positions became available. They contend that these decisions were motivated by age discrimination because the replacement workers as a group were younger than the striking workers as a group.[1] Relying on *Metz v. Transit Mix*, 828 F.2d 1202 (7th Cir. 1987), the plaintiffs argue that it is unlawful under the ADEA to eliminate older employees as a group based on higher salaries so as to replace them with generally younger workers, who would work for less. In addition to being factually distinguishable from *Metz*, this Court has not adopted the *Metz* line of reasoning, and we decline to do so in this case. *See Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir. 1991) (termination due to higher pay is not relevant to age discrimination but seniority); *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981), *cert. denied*, 455 U..S. 943 (1982) (seniority and age discrimination are unrelated).

This Court has held that the plaintiff "must show that [the employer] gave preferential treatment to a younger employee under 'nearly identical' circumstances." *Little*, 924 F.2d at 97. We agree with the district court that comparing the recall of older strikers with the recall of younger strikers provides more meaningful evidence of differential treatment than does a comparison of the strikers with their replacements. Additionally, age differences between an established workforce and a newly hired one are only natural. "[I]n a normal case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in." *Laugesen v. Anaconda Company*, 510 F.2d

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[1] Members of the plaintiffs' group include workers under 40 years old.

307, 313 n. 4 (6th Cir. 1975). Consequently, we conclude that the test articulated by the district court was appropriate under the facts of this case.

The plaintiffs failed to meet the test set out by the district court. They failed to establish that the company refused to consider recall applications of protected employees over age forty. The record indicates that of the 34 strikers who were returned to work prior to the end of the strike, 20 were age forty or over. All of the remaining strikers, regardless of age, were permanently replaced. Pursuant to the recall agreement, the defendant made 120 recall offers. The average age of the strikers to whom these offers were made was 49.4 years old. Of the 120 offers, 104 went to persons age 40 or over, while only 16 went to persons under age 40. In light of the lack of evidence showing that younger strikers were more favorably treated than older strikers, we conclude that the plaintiffs have not established a *prima facie* case.

For the foregoing reasons, the request for rehearing is DENIED.